



**The Comptroller General
of the United States**

Washington, D.C. 20548

G. V. Hooley

Decision

Matter of: Harbour Air, Inc.
File: B-235534.2
Date: July 27, 1989

DIGEST

Protest filed more than 10 days after protester was orally informed that its agency-level protest had been denied, and the basis therefor, is untimely; protester may not delay filing its protest until it has, in writing, the agency decision.

DECISION

Harbour Air, Inc., protests the award of a contract to Winchester Aviation, Inc., under request for proposals (RFP) No. DLA600-89-R-0023, issued by the Defense Logistics Agency, Defense Fuel Supply Center (DFSC). The RFP contemplated award of a fixed-price contract with economic price adjustment for into-plane fuel delivery at Cherry Capitol Airport, Traverse City, Michigan. Harbour contends that Winchester's award price does not reflect the cost of supplying the fuel and thus amounts to a buy-in.

We dismiss the protest as untimely.

Harbour initially protested the matter to DFSC. DFSC advises that on June 27, 1989, a DFSC attorney telephonically informed Harbour's counsel that its protest had been denied and read sections of the contracting officer's letter concerning that determination. According to DFSC, the DFSC attorney also told Harbour's counsel that the contracting officer's letter included a copy of the award sheet from the protested solicitation and explained what the award sheet revealed regarding Harbour's and Winchester's prices. Harbour protested DFSC's denial of its protest to our Office on July 14, stating that it received the agency's June 26 written denial of its protest on June 30.

Under our Bid Protest Regulations, where a protest initially was filed with the contracting agency, a subsequent protest

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to our Office must be filed within 10 working days after the protester learned of adverse action at the agency level. 4 C.F.R. § 21.2 (1988). We have expressly held that oral notification of the contracting agency's denial of the protest filed with it starts the 10-day period running, Elite Building Servs., B-230867.2, June 10, 1988, 88-1 CPD ¶ 556, and that a protester may not delay filing its protest until it has received the agency's position in writing. Universal Fuel, Inc., B-231870, Oct. 4, 1988, 88-2 CPD ¶ 318. Here the oral notification on June 27 began the 10-day period, so that the July 14 protest to our Office is untimely.

In any event, we note that the fact that Winchester's offer may be below the actual cost of performance does not provide a basis to object to the award. There is nothing illegal or improper in the government's acceptance of a low or below-cost proposal so long as the offeror is judged capable of performing at that price. Trak Engineering, Inc., B-231791, Oct. 28, 1988, 88-2 CPD ¶ 402. The regulations require only that the contracting officer take appropriate action to ensure that losses due to below-cost awards are not recovered. Federal Acquisition Regulation § 3.501-2(a).

The protest is dismissed.

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for Robert M. Strong
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